

1. Did claimant injure his neck in an accident that arose out of and in the course of employment with respondent?
2. If so, did claimant provide respondent with timely notice of the accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes the December 10, 2004 Order should be affirmed.

In November 1978, claimant began working for the respondent, J.C. Penney Company, Inc., in its warehouse. While performing his job loading trailers, claimant operated fork lifts and tuggers, which required him to turn his neck to look over his right shoulder.

In April 2004, while operating a fork lift and looking over his right shoulder, claimant felt pain in his neck. Although claimant's neck pain did not resolve, he continued working. Claimant was not initially concerned about his neck pain as it was not unusual to experience aches and pain due to his work on respondent's shipping dock. Claimant explained, in part:

At the time I didn't consider it real significant. It was just another pain. You get things all the time working on the shipping dock. You don't think that much about them until something happens. Usually you'd go home and they'd go away in a few hours or the next day or two.¹

But over the next several weeks, claimant experienced tightness and stiffness in his neck, which caused his head to turn involuntarily to the right. Shortly after consulting a doctor in May 2004, claimant told his supervisor about his neck problem and how it had worsened over the last couple of weeks.

Claimant worked for respondent through approximately May 21, 2004, when he left work for medical treatment. Claimant was diagnosed as having spasmodic torticollis and was prescribed botox injections.

On approximately July 6, 2004, claimant returned to work for respondent and worked light duty for about two weeks before returning to regular duty. But in approximately September 2004, respondent returned claimant to light duty work.

¹ P.H. Trans. at 56.

After observing claimant testify and gauging his credibility, the Judge granted claimant's request for medical benefits. Considering claimant's testimony and the medical records introduced at the preliminary hearing, the Board finds no persuasive reason to disturb the Judge's Order. Claimant described operating a fork lift and experiencing pain in his neck while looking over his right shoulder. As claimant continued to work his symptoms progressed and his neck stiffened, which caused his head to rotate to the right. For preliminary hearing purposes, claimant has established he injured his neck in an accident that arose out of and in the course of employment with respondent.

The Board also affirms the Judge's implied finding that claimant provided timely notice of his accident. The record is uncontradicted that claimant told his supervisor in May 2004 about the problems he was having with his neck. The Board finds it is more probably true than not that claimant's neck injury developed as a series of mini-traumas and, therefore, the May 2004 notice was timely as it was given during the period claimant was enduring trauma to his neck. Moreover, should medical evidence later establish that claimant's neck injury was caused by only one incident or accident in April 2004 rather than a series of mini-traumas, these facts would establish just cause that would extend claimant's notice period from 10 days to 75 days. For preliminary hearing purposes, the Board concludes the notice requirements of K.S.A. 44-520 have been met.

As provided by the Workers Compensation Act, preliminary hearing findings are subject to modification upon a full hearing of the claim and full presentation of the evidence.²

WHEREFORE, the Board affirms the December 10, 2004 Order entered by the Honorable Steven J. Howard.

IT IS SO ORDERED.

Dated this ____ day of May 2005.

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
William G. Belden, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

² K.S.A. 44-534a(a)(2).